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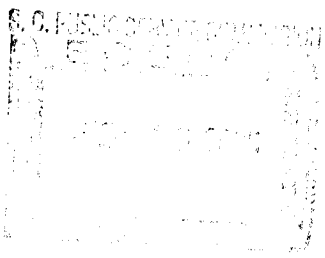
September 16, 2005



VIA ELECTRONIC MAIL AND FIRST-CLASS MAIL SERVICE
The Honorable Charles L.A Terreni
Chief Clerk
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: Petition and Complaint of AT&T Communications of the Southern States, LLC for Suspension and Cancellation of Transit Traffic Service Tariff No. 205-138 filed by BellSouth Telecommunications, Inc.
Docket No. 2005-63-C, Our File No. 611-10299

Dear Mr. Terreni:

Enclosed is the original and ten (10) copies of the **Post-Hearing Brief of AT&T** filed by AT&T Communications of the Southern States, LLC in the above-referenced docket.

Please acknowledge your receipt of this document by file-stamping the copy of this letter enclosed, and returning it in the enclosed envelope. By copy of this letter, I am serving all current putative parties of record and enclose my certificate of service to that effect.

If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

John J. Pringle, Jr.

John J. Pringle, Jr.
by CR

JJP/cr
cc: all parties of record
Enclosures

BEFORE THE

SOUTH CAROLINA PUBLIC SERVICE COMMISSION

DOCKET NO. 2005-63-C

IN RE:	)	
	)	
Petition and Complaint of AT&T Communications of the Southern States, LLC for Suspension and Cancellation of Transit Traffic Service Tariff No. 2005-138 filed by BellSouth Telecommunications, Inc.	)	**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served this day, one (1) copy of the **Post-Hearing Brief of AT&T** by placing a copy of same in the care and custody of the United States Postal Service (unless otherwise specified), with proper first-class postage affixed hereto and addressed as follows:

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September 16, 2005
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BEFORE THE

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2005-63-C

S. C. PUBLIC SERVICE COMMISSION
RECEIVED
SEP 19 2005

BellSouth Telecommunications, Inc.)
Transit Traffic Service Tariff) **POST-HEARING BRIEF OF AT&T**
No. 2005-50)

RECEIVED

AT&T Communications of the Southern States, LLC ("AT&T"), pursuant to the directive of the Public Service Commission of South Carolina (the "Commission") at the conclusion of the hearing held in this matter on August 22, 2005, submits its post-hearing brief. This brief sets forth AT&T's position regarding specific legal issues that have arisen during the course of this proceeding.

INTRODUCTION

This docket was initiated by the filing of BellSouth Telecommunications, Inc.'s ("BellSouth") request for approval of a tariff for Transit Traffic rates on February 2, 2005. Transit Traffic occurs when a carrier other than BellSouth originates a call that is transited over the BellSouth network for termination with another carrier other than BellSouth. This kind of "indirect" interconnection occurs because there are no direct connections of facilities between the originating and terminating carriers. As a result of the filing of the BellSouth tariff, AT&T filed a Petition and Complaint challenging the rate to be charged for Transit Traffic. Complaints and interventions were also filed by other parties. Subsequent to the filing of AT&T's Complaint, BellSouth revised its Transit Traffic tariff to state:

> ***...Pursuant to this tariff, charges for Transit Traffic Service in this tariff shall apply only to those Telecommunications Service Providers that do not have***

an interconnection agreement with BellSouth providing for payment for Transit Traffic Service for any particular type of Transit Traffic as describe[d] in A16.1.2.B. below. Charges for Transit Traffic Service in this tariff shall not be applied to any carrier who has an expired interconnection agreement providing for payment for Transit Traffic Service if the carrier is engaged in ongoing negotiation or arbitration for a new interconnection [agreement] and the former agreement provides for continuing application during that period.

In addition to the changed tariff language, in the Notice of Filing that accompanied the tariff revision BellSouth committed that "it will not assert that regulatory approval of this tariff constitutes a finding that resolves the issue of whether or not BellSouth has an obligation to provide cost-based transit traffic service pursuant to a negotiated or arbitrated interconnection agreement in accordance with 47 USC §§ 251 and 252."

Because the combination of the revised tariff language and the BellSouth commitment not to use approval of the tariff as precedent regarding BellSouth's obligation to provide transit traffic service at cost-based rates reasonably satisfied AT&T's concerns raised in its Complaint, AT&T filed a Notice of Withdrawal of its Complaint on May 4, 2005. Notwithstanding the withdrawal of its Complaint, AT&T remained a party in the docket in order to protect its interests as they might arise during the course of the proceeding.

As the docket progressed and written testimony was filed, two issues were identified that caused great concern to AT&T. The first issue was the South Carolina Telephone Coalition's ("SCTC") position that Transit Traffic Service rates for calls originating on SCTC member networks should be paid by the terminating carrier. AT&T opposed that position and filed rebuttal testimony explaining why the traditional policy of

"originating carrier pays" should be maintained. At the beginning of the hearing BellSouth and the SCTC announced an agreement that resulted in the withdrawal of SCTC's prefiled testimony. Thus, the issue of "who pays" the transit rates was effectively removed from this proceeding.

The second, and only remaining issue of concern for AT&T, involves the legal issue of whether BellSouth has an obligation to provide Transit Traffic Service under Sections 251 and 252 of the Telecommunications Act of 1996. AT&T contends that BellSouth does indeed have such an obligation; BellSouth believes it does not. The resolution of this issue is not required in order for the Commission to reach a decision regarding the merits of whether or not BellSouth's Transit Traffic tariff should be approved. However, at page 5 of BellSouth's prefiled testimony, the witness states that no such obligation exists and in footnote 2 thereof BellSouth promises to address this legal issue more extensively in its post-hearing brief. Despite its belief that this matter is unnecessary for the Commission to address in reaching its decision, AT&T feels compelled to explain why BellSouth does indeed have a legal obligation to provide Transit Service, because BellSouth has indicated that it will include this subject in its brief.

I. BellSouth Has a Legal Obligation to Provide Transit Traffic Service at TELRIC-Based Rates.

Section 251(a) of the Telecommunications Act of 1996 requires all telecommunications carriers to "interconnect directly or indirectly" with all other telecommunications carrier networks.[1] It requires interconnection of all carriers, but expressly gives carriers the option of relying on *indirect* interconnection to accomplish that end. This is essential to efficient networking, because direct interconnection between each and every carrier would be neither cost efficient nor technically feasible. Thus, Congress required carriers both to accept and to enable one another to establish technically feasible *indirect* interconnection – *i.e.*, the transiting function – to ensure that the telecommunications network remains fully interconnected, as Congress envisioned.

The fundamental purpose of § 251(a) is to "promote the interconnection of all telecommunications networks by ensuring that incumbent LECs are not the only carriers that are able to interconnect efficiently with other carriers."[2] *Indirect* interconnection under § 251(a) thus plainly encompasses the obligation of the "middle" carrier to provide transit between the two indirectly interconnected carriers. Indeed, Congress' requirement that all carriers "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers" would be meaningless if that requirement did not also

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[1] 47 U.S.C. § 251(a)(1).

[2] Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15,435, 15,478 ¶ 84 (2001) ("*Collocation Remand Order*"), *aff'd sub nom. Verizon Telephone Cos. vs. FCC,* 292 F. 3d 903 (D.C. Cir. 2002); *See also* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15,499, 15,591 ¶ 997 (1996), *aff'd in relevant part, Competitive Telecommunications Ass'n vs. FCC,* 117 F.3d 1068 (8th Cir. 1997), *aff'd in part, vacated in part, Iowa Utilities Board,* 120 F. 3d 753(8th Cir. 1997) *aff'd in part, reversed in part, AT&T Corp. vs. Iowa Utilities Board,* 525 U.S. 366 (1999) (subsequent history omitted) ("*Local Competition Order*") (noting that the [section 251] duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives.")

encompass the requirement to maintain, where technically feasible, an open connection between two indirectly interconnected carriers.

Incumbent LECs have a special duty to provide transit services under both § 251(a) and § 251(c)(2). Section 251(c)(2) requires incumbent LECs to interconnect with requesting carriers for the "transmission and routing of telephone exchange services and exchange access."[3] Nothing in the language of § 251(c)(2) limits this duty to traffic exchanged solely between the requesting carrier and the ILEC. Thus, this section must be interpreted to require incumbent LECs also to provide interconnection for the transmission and routing of traffic between a requesting carrier and other third party carriers. Moreover, in the *Local Competition Order* (at ¶ 176), the FCC rejected the argument "that reading section 251(c)(2) to refer only to the physical linking of networks implies that incumbent LECs would not have a duty to route and terminate traffic," because that "duty applies to all LECs and is clearly expressed in section 251(b)(5)." Thus, § 251(c)(2), read together with § 251(a)(1), which gives all carriers the right to indirect interconnection, establishes that incumbent LECs must provide the transit function to CLECs.

This conclusion is supported by the ruling of the North Carolina Utilities Commission in response to a petition for a declaratory ruling on whether Verizon, an ILEC, had an obligation, as a matter of law, to transit third party traffic based upon requirements under the Act as well as state law:

> If there were no obligation to provide transit service, the ubiquity of the telecommunications network would be impaired. Indeed, in a small way this has already happened in this case when Verizon refused to transit certain traffic...

[3] 47 U.S.C. § 251(c)(2).

> These effects illustrate the ultimate unsupportability of the Opponent's view of their obligations as ILECs to interconnect indirectly – essentially, as matters of grace, rather than duty... The fact of the matter is that transit traffic is not a new thing. It has been around since 'ancient' times in telecommunications terms. The reason that it has assumed new prominence since the enactment of [the 1996 Act] is that there are now many more carriers involved – notably, the new CMRS and the [CLECs] – and the amount of traffic has increased significantly. Few, if any, thought about complaining about transit traffic until recently. It strains credulity to believe Congress in [the 1996 Act] intended, in effect, to impair this ancient practice and make it merely a matter of grace on the part of the ILECs, when doing so would inevitably have a tendency to thwart the very purposes that [the 1996 Act] was designed to allow and encourage.[4]

BellSouth relies heavily on a decision by the FCC's Wireline Competition Bureau the *Virginia Arbitration Order*[5] to support its position that it has no obligation to provide transit services. In that decision the Wireline Competition Bureau stated that "In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates." BellSouth relies on this statement to support its claim that the FCC has rejected any notion of an ILEC obligation to provide transit service. BellSouth's reliance is misplaced. It is clear from the quote above that the Wireline Competition Bureau was unwilling to make decision on this issue because there was no prior precedent set out by

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[4] *Petition of Verizon South, Inc. for Declaratory Ruling That Verizon is Not Required to Transit InterLATA EAS Traffic Between Third Party Carriers and Request for Order Requiring Carolina Telephone and Telegraph Company to Adopt Alternative Transport Method,* Order Denying Petition, Docket No. P-19 SUB 454 (Sept. 22, 2003) at 6-7.

[5] *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration; Petition of AT&T Communications of Virginia, Inc., Pursuant to Section 252(e) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission regarding Interconnection Disputes with Verizon-Virginia, Inc.* CC Docket Nos. 00-218, 00-251, *Memorandum Opinion and Order,* 17 FCC Rcd 27,039 (2002) ("*Virginia Arbitration Order*").

the full Commission. In other words, the only thing the Wireline Competition decided was to make no decision. Notwithstanding the Wireline Competition Bureau's unwillingness to make a decision, the law does indeed require indirect interconnections pursuant to § 251(a). *See Atlas Telephone Company vs. Oklahoma Corporation Commission*, 400 F. 3d 1256 (10th Cir. 2005):

> The fallacy of the [ILECs'] argument is demonstrated in a number of ways. The [ILECs] contend that the general requirement imposed on all carriers to interconnect "directly or *indirectly*," 47 U.S.C. § 251(a) (emphasis added by the court), is superceded by the more specific obligations under § 251(c)(2). Yet, as noted above, the obligation under § 251(c)(2) applies only to the far more limited class of ILECs, as opposed to the obligation imposed on all telecommunications carriers under § 251(a). The [ILECs'] interpretation would impose concomitant duties on both the ILEC and a *requesting* carrier. This contravenes the express terms of the statute, identifying only ILECs as entities bearing additional burdens under § 251(c). We cannot conclude that such a provision, embracing only a limited class of obligees, can provide the governing framework for the exchange of local traffic. We also find that the [ILECs'] interpretation of § 251(c)(2) would operate to thwart the pro-competitive principles underlying the Act.[6]

Because tandem transit is included in the interconnection BellSouth is required to provide at forward-looking costs under the FCC's rules implementing § 251(c)(2), the Act requires that it be priced at TELRIC rates.

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[6] *Atlas*, at 1265-66. *See also In re: BellSouth Telecommunications, Inc.'s Petition for a Declaratory Ruling Regarding Transit Traffic,* Georgia Public Service Commission Docket No. 16772-U, Order on Clarification and Reconsideration, May 2, 2005, citing *Atlas* as standing for the principle that "the Section 251(a) obligation of all carriers to interconnect directly or indirectly is not superceded by the more specific obligations under Section 251(c)(2)."

II. The Obligation For ILECs to Provide Transit Services is Supported by Sound Regulatory Policy.

There are sound policy and public interest reasons justifying a requirement that BellSouth provide transit tandem interconnection. Use of BellSouth's local tandem is essential to CLECs' ability to exchange traffic with smaller LECs (*e.g.*, small independent companies, rural companies, wireless companies, and other CLECs) where direct interconnection of facilities is commercially impractical. Even aside from the commercial impracticability of such direct interconnection, the time and expense required to negotiate – if possible – interconnection agreements with a myriad of smaller carriers would by itself significantly impede the development of local competition and would do so unnecessarily. The financial and operational effect of implementing direct interconnection would be substantial. Today, carriers that are indirectly interconnected exchange transit traffic on a bill and keep basis without executing an interconnection agreement in order to route traffic efficiently and to reduce administrative costs. A direct interconnection requirement would force those carriers to enter into interconnection agreements and resolve a broad range of issues, such as: one-way versus two-way trunking, billing and recording, signaling, and allocation of interconnection expenses between the parties. All of these issues would have to be negotiated between the parties – a significant task, especially where, as with CLECs and CMRS providers, there is no right to compel arbitration.

If CLECs are not able to use BellSouth's existing local tandems to transmit calls to – and receive calls from – carriers already receiving BellSouth traffic through those tandems, the CLECs' customers will be unable to deliver calls to or receive calls from

customers served by those small carriers. This inability to provide a complete calling package would place CLECs at an additional competitive disadvantage to BellSouth and would further delay the deployment of facilities-based local competition. Congress clearly did not intend such a result when it passed the 1996 Act in order to bring the benefits of local exchange competition to all Americans.

III. BellSouth's Transit Traffic Service is Subject to the "Just and Reasonable" Standard of S.C. Code Section 58-9-210

BellSouth made an argument at the hearing in this Docket that transit traffic service is considered one of the "other services" pursuant to to S.C. Code Annotated § 58-9-576. According to BellSouth's argument, if transit service is an "other service" under its price regulation plan, then the only challenge to the transit traffic rate would be the allegation that service is priced below its total service long run incremental cost ("TSLRIC"). *See* S.C. Code Ann. Section 58-9-576(B)(5). Particularly, BellSouth posits that the enactment and recent amendments to Section 576 supercede the Commission's jurisdiction to determine whether a rate is "just and reasonable" per S.C. Code Section 58-9-210.

As set forth above, BellSouth has an obligation to provide the transit function at TELRIC rates. Therefore, that service is not one of the "other services" pursuant to BellSouth's price regulation plan, just as BellSouth's UNE services are not Section 576 "other services." More generally, transit service is not a Section 576 "other service" because BellSouth is the sole provider of that service and is not subject to competition for that service. As the hearing testimony demonstrated, there is no ready "market" for the

provision of transit service. (See Cross-Examination of BellSouth Witness McCallen by Counsel for Alltel, Transcript at p. 100-101).

The provision in Section 58-9-576 (a statute under which BellSouth has chosen "price" regulation appropriate for a competitive market) related to the "TSLRIC" of such a service establishes a price "floor" for "other services." This limitation is designed to prohibit predatory (below cost) pricing by the incumbent. Because BellSouth is the monopoly provider of transit service, it would have no reason or incentive to price transit service below cost, but rather above cost. In other words, transit service is not an "other service" because it has not been, is not, and will not be a service that is subject to competition of any type. As such, it is not a service subject to the pricing standards set out in Section 576. Therefore, transit service is required to meet, among other requirements, the "just and reasonable standard set out in S.C. Code Ann. Section 58-9-210.

CONCLUSION

AT&T does not object to the Commission's approval of the BellSouth Transit Traffic tariff. This brief is submitted in response to the anticipated argument that BellSouth indicated it would make in its brief to the effect that it has no obligation to provide transit traffic service. As previously stated, AT&T does not believe it is necessary for this Commission to rule on this particular issue in order to reach a final decision in this case – and we urge the Commission to refrain from doing so. If, however, the Commission does feel compelled to rule on this matter, for the reasons set forth above, it should find that BellSouth does, in fact, have a legal obligation to provide transit traffic service at TELRIC-based rates.

Respectfully submitted this 16th day of September 2005,

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